REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 106 of 2007

FRANKLIN MWANGA SHIRISIA)..... 1ST APPLICANT

STANLEY MAINA KINYUA)..... 2ND APPLICANT

VERSUS

REPUBLIC..... RESPODENT

JUDGMENT

FRANKLING MWANGA SHIRISIA and **STANLEY MAINA KINYUA** were jointly charged with robbery with violence contrary to section 296(2) of the Penal Code that on the 27th day of March 2007 at National Petrol Station along Uganda road in Uasin Gishu District of the Rift Valley Province jointly while armed with dangerous weapons namely pistols robbed Edward Wafula his motor vehicle registration number KAR 743H make Toyota Corolla saloon, one mobile phone make LG, one wrist watch, cash Kshs.1000/= one ceska pistol loaded with 15 rounds of ammunition and a certificate of appointment all valued at kshs.600,000/= and immediately before the time of such robbery threatened to use actual violence to the said Edward Wafula. They pleaded not guilty. The prosecution called five witnesses at the end of whose evidence the accused persons were found to have a case to answer.

In their defence they gave unsworn evidence in which they merely denied involvement in the crime. They did not call any witnesses. They were found guilty and convicted of simple robbery contrary to section 296(1) of the Penal Code and sentenced to serve imprisonment for a term of 5 years each. Dissatisfied, they have brought this appeal and the grounds of their appeals which appeals were consolidated for purposes of hearing are that they were not properly identified, the evidence adduced was not corroborated, there were contradictions in the prosecution evidence, the identification parade was not properly conducted, and vital witnesses were not called to give evidence and their defence evidence was ignored. In their written submissions and in their oral submissions they emphasized the grounds of appeal.

Learned state counsel opposed the appeal contending that the offence was committed with the car lights on and the complainant positively identified the Appellants and that is why he picked them with ease at the identification parade. He submitted that the offence committed was indeed robbery with violence contrary to section 296(2) of the Penal Code as the Appellants were armed with pistols and they threatened to kill the complainant although eventually they did not harm him. He submitted that absence of the pistols as exhibits could be due to the Appellants having disposed off them as there was a time lapse between the date of the commission of the offence and the time of arrest. He submitted that the Appellants should be convicted of the offence of robbery with violence and be accordingly sentenced.

I have evaluated and assessed the evidence at trial. The complainant stated that the robbery took about 20 minutes and there was light from the roof of the car in the inside. That part of his evidence was not contradicted by the Appellants. He said the Appellants were with him in the car and indeed the first Appellant sat with the complainant in the front of the car. Twenty minutes is a long time and as the Appellants were not hooded then I concur with the trial magistrate that that was sufficient time for and the circumstances allowed for positive identification. The contradictions as to the colour of the car are so immaterial that they could not affect the guilt of the Appellants. Looking at the photographs of the car and depending on one's appreciation of colours and the shade of the colour of the car one could either say grey or blue but again that in my view is not a material contradiction going to the root of material

evidence. The Appellants did not state what was not done according to Law as regards the identification parade and that part of their submission lacks merit. There is no law requiring that all witnesses having evidence about an offence be called to give evidence or any number of them be called so the submissions that vital witnesses who are unnamed were not called similarly lacks merit.

The state did not cross-appeal for purposes of enhancing the sentence after conviction on the higher offence and while the court is not lacking in jurisdiction to convict for the bigger offence, there was in this case not sufficient evidence to prove robbery with violence contrary to section 296(2) of the Penal Code. Not only was there no violence used against the complainant, there was no threat of using violence. All the Appellants are said to have said was "leo umepatikana'. And the complainant said that they told him that they were robbers and that they kill. That to me does not mean the same thing as threatening to kill. In my view the complainant was not threatened with death. He was not harmed. Yes he was scared because he said the Appellants were armed with pistols but the fact of being armed alone without accompanying violence or threat to use violence to my mind does not amount to proving an offence under S.296(2) of the Penal Code. No material part of the Appellant's defence was not considered by the trial magistrate in my view. In my judgment there was sufficient prosecution evidence to prove the offence Appellants were convicted of and not enough defence evidence to disprove the offence. In my consideration the trial magistrate was right in her judgment and a term of imprisonment of 5 years was sufficient in the circumstances of the case. Accordingly the appeals are found to be without merit and are hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. Chirchir holding brief for Mr. Omutelema for the state

Appellants in person

Court Clerk - Paul.